



The admission of hearsay evidence, evidence obtained from entrapment and the interception and monitoring of communications in arbitration proceedings conducted in terms of the Labour Relations Act, 1995

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Submitted in Partial Fulfillment of the Requirements for the Degree of Master of Laws in Labour Studies in the School of Law, University of KwaZulu Natal

2014

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Acknowledgements

I would like to thank God for giving me the strength to complete this dissertation and my master's programme. My gratitude also goes out to Benita Whitcher who gave me an incredible amount of direction academically, and for the amount of effort she put in supervising this work. I am also thankful to Nandipha Makhaye for the amount of support and encouragement she gave me throughout my academic journey. Lastly I would like to pay tribute to my late family members for setting good standards which I aspired to live up to. Their spirit lives on.

Abstract

The law of evidence takes quite a rigid stance in criminal courts in order to afford an accused person a fair trial, as envisaged by the Constitution. It thus follows that the standard of proof in criminal courts is beyond a reasonable doubt. In civil courts the standard is not as high, and is thus based on a balance of probabilities. Nonetheless, civil court proceedings have to afford fairness to all parties in a particular matter. Part of achieving fairness requires adherence to the rules of evidence. In any case, evidence plays a crucial role in determining a case. It is thus of paramount importance to follow the rules of evidence when deciding whether to admit or reject evidence, its evaluation and the weight to attach to it.

The Commission for Conciliation Mediation and Arbitration (CCMA) is a statutory body established to process labour disputes with minimum of legal formalities, and in the shortest time possible due the amount of disputes that it deals with, in light of its easily accessible services. The CCMA is not a civil court. Thus CCMA proceedings are not civil proceedings. The environment of CCMA proceedings should not duplicate court proceedings because of the informal nature of the CCMA. However, this informality should not cause commissioners or arbitrators to not deal with the merits of any matter in which they are presiding over.

A number of arbitration awards have been successfully reviewed due to errors committed by arbitrators, with regard to evidentiary errors. This paper will look into the admissibility of some of the most testing kinds of evidence to deal with, namely: hearsay evidence, evidence obtained from entrapment and evidence obtained from the interception and monitoring of employees telecommunications. This paper will also assert to clarify when such evidence should be admitted and when it should be rejected, in light of the CCMA not conducting civil proceedings yet still having a standard of proof based on a balance of probabilities.

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Chapter One: Introduction

1.1 Introduction 1

The Commission for Conciliation, Mediation and Arbitration (CCMA) and Bargaining Councils are statutory bodies created in terms of the Labour Relations Act, 1995¹ (LRA) to provide for statutory arbitration of specified labour disputes. In terms of the LRA, if a dispute that has been referred to the CCMA or Bargaining Council remains unresolved after conciliation, the CCMA or relevant Bargaining Council must arbitrate the dispute if the LRA or other legislation requires arbitration in terms of the LRA.

The CCMA and Bargaining Councils have jurisdiction to arbitrate a wide variety of labour disputes, including disputes concerning dismissal for misconduct and incapacity,² constructive dismissals, a retrenchment dispute where the process involved only one employee,³ severance pay,⁴ unfair labour practices,⁵ organizational rights⁶ and the interpretation and application of settlement and collective agreements⁷. Every year thousands of these disputes are referred to the CCMA and Bargaining Councils for arbitration.

In general, arbitration is a process where a neutral third-party makes a decision on a specified range of disputed issues and at the end of the case issues a written arbitration award (a written judgment).⁸

Most of these arbitrations involve the leading of evidence because factual disputes can only be resolved through the leading of evidence. Evidence is anything or statement that might prove the truth of the fact at issue. Evidence is that which demonstrates, makes clear, or proves the truth of the fact at issue. Section 138 of the LRA also envisages parties to the dispute giving evidence, calling witnesses and questioning witnesses of any other party where appropriate. Moreover,

¹ Act 66 of 1995

² Section 191 of the LRA

³ Section 191 of the LRA

⁴ Section 41 of the BCEA

⁵ Section 191 of the LRA

⁶ Section 22 of the LRA

⁷ Section 24 of the LRA

⁸ *Carephone (Pty) Ltd v Marcus NO* (1998) 19 ILJ 1425 (LAC)

statutory arbitrations are also hearings *de novo* in that the arbitrator must base his or her decision on evidence led at the arbitration.

The common law rules of evidence provide strict rules regarding the method of adducing evidence, the admissibility of evidence, how courts must evaluate admitted evidence to come to a decision, and rules regarding the onus and standard of proof to be discharged before a party to litigation can succeed. There are also strict rules applicable to the presentation of different types of evidence. Various statutes have also confirmed, supplemented and in some cases modified the common law rules of evidence.

What is of critical importance, is that in accordance with the primary objective of the LRA and particularly section 138 of the LRA, the arbitrating commissioners of the CCMA and Bargaining Councils are enjoined to conduct the arbitration in a manner appropriate to determining the dispute fairly and quickly and with the minimum of legal formalities. This requirement has been interpreted to mean that statutory arbitrators are permitted to adopt an adversarial or inquisitorial procedure when appropriate and that arbitrations must be conducted without strict adherence to the rules of evidence relevant to traditional court proceedings which necessarily entails a relaxation, if not exclusion, of the traditional exclusionary rules pertaining to the presentation and admission of evidence.

Further, various ‘codes of good practice’ and guidelines have been promulgated in terms of the LRA which influence the presentation and evaluation of evidence in arbitrations, including ‘The CCMA guidelines on how to conduct misconduct arbitrations’. These codes provide guidelines but in effect have a quasi-statutory force as the CCMA and Bargaining Councils have to have regard to them in the process of resolving disputes.⁹ An assessment of these guidelines will show that in accordance with section 138 of the LRA, they propose a less technical approach to evidence in arbitrations.

The test for review of arbitration awards is also strict. A decision of an arbitrator will be considered unreasonable and thus reviewable only if it is one that a reasonable arbitrator could not reach on all the material [evidence and submissions] that was before the arbitrator. Material errors of facts,

⁹ J Grogan *Workplace Law* 10 ed (2009) 11

as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.¹⁰ This means that the review courts must not be overly strict when assessing how arbitrators dealt with the admissibility and evaluation of evidence.

The nature of labour law is also relevant to the issue. Pillay J, in the case of *Public Servants Association obo Haschke v MEC for Agriculture & others*¹¹ commented on the nature of labour law:

*“Labour law has elements of administrative law, procedural law, private law and commercial law”.*¹²

1.2 Conclusion

It has been briefly shown that labour proceedings can be deemed *sui generis* proceedings in the sense that it does not fall squarely into a particular niche or branch of law. The legal proceedings of labour law are largely governed by statute. The normal rules of evidence as applicable in criminal and civil proceedings are not to be strictly applicable in the proceedings of statutory arbitrations.

¹⁰ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC); *Herholdt v Nedbank Ltd and Another* (2013) 11 BLLR 1074 (SCA)

¹¹ 2004 (8) BLLR (LC)

¹² *Public Servants Association obo Haschke v MEC for Agriculture & others* 2004 (8) BLLR (LC) at para 11

1.3 Statement of purpose

This paper considers the admissibility and evaluation of particular types of evidence in arbitration proceedings in the context described above. This evidence includes hearsay evidence, evidence obtained from entrapment and evidence obtained from the interception and monitoring of telecommunications of employees. The paper will consider how arbitrators have dealt with these forms of evidence and whether the flexibility regarding the admissibility of evidence as described above is being adhered to. Any proper discussion on this topic must and will cover in more detail the conduct of arbitrations under the LRA and the influence of the review jurisprudence that has been developed in relation to the admissibility and evaluation of evidence in arbitration proceedings.

1.4 Research questions

This dissertation attempts to find answers to the following questions in the context of labour law:

1. The nature of arbitration proceedings conducted in terms of the LRA
2. The powers and duties of arbitrators
3. What is the purpose of evidence in arbitration proceedings?
4. The rules for the admissibility of evidence in arbitration proceedings
5. The rules for the evaluation of evidence in arbitration proceedings
6. The difference between admissibility and weight of evidence
7. The admissibility and evaluation of hearsay evidence in arbitration proceedings.
8. The admissibility and evaluation of evidence obtained from entrapment in arbitration proceedings.
9. RICA and the admissibility and evaluation of evidence obtained from the interception and monitoring of telecommunications of employees in arbitration proceedings.
10. The review of arbitration proceedings.

1.5 Literature review

There is only one local text book on evidence which has a section which deals primarily, but briefly, with evidence in labour law. This is the work of B Whitcher in Bellengere *et al*, *The law of Evidence in South Africa: Basic Principles*’ Oxford (2013). I have also relied on the well-known evidence text books by Schwikkard & Van Der Merwe and; Zeffertt, Paizes & St Skeen. This dissertation will rely on J Grogan’s work, who is a prolific writer on labour law. Seminal judgments by reputable judges such as Wallis J, Zondo J and Le Grange J will be used. The remaining sources are derived from case law reports and journal articles.

1.6 Overview of the chapters

The study is divided into twelve chapters. Chapter one comprises of the introduction and literature review. Chapter two deals in general with the definition and purpose of evidence and the different forms of evidence. Chapter three looks at the issue of the standard and onus of proof in labour law. Chapter four discusses the conduct of arbitration proceedings and the powers and duties of arbitrators. Chapter five will deal with the admissibility of evidence in arbitration proceedings. Chapter six will deal with the evaluation of evidence based on the LRA, relevant case law and the review jurisprudence developed in respect of arbitration proceedings. The next chapters will look at the admissibility and evaluation of particular forms of evidence: Chapter seven will deal with hearsay evidence; Chapter eight with evidence from entrapment and; Chapter nine with RICA and evidence obtained from the interception and monitoring of employees’ telecommunications. Chapter ten will look at the Electronic Communications and Transaction Act. Chapter eleven will deal with reviews conducted under the LRA. Chapter twelve will constitute a concluding chapter with concluding remarks on the subject in general.

Chapter 2: The definition and purpose of evidence

2.1 Introduction

This chapter will discuss what evidence is and what it is used for. The types of evidence will also be discussed to give a clear indication of which kinds of material fall into which category of evidence. Documentary evidence tends to be widely used in arbitration proceedings due to the fact that workplace material is mostly captured on computer systems, thus it ends up being part of the evidence used in arbitration. Oral evidence is the starting point in producing any evidence as oral testimony has to be given by the parties to a dispute. It may also be used to refute any point made by the opposing party. Real evidence is evidence which is physical and forms part of what was used in the commission of an act which led to the existence of the dispute.

2.2 Definition and Purpose of Evidence

Evidence is information presented at a hearing to prove certain facts that are disputed by two parties. Evidence is defined as:

“any thing or statement that might prove the truth of the fact in issue. Evidence is that which demonstrates, makes clear, or proves the truth of the fact in issue.”¹³

Evidence is made up of relevant facts and inferences which can be drawn from those facts, which tend to prove or disprove an issue in dispute. In simple terms it is information or things placed before a hearing designed to prove or disprove facts, and to influence the arbitrator’s decision on a matter. This evidence is either oral testimony, admissions of facts (undisputed facts); documentary evidence (for example, affidavits, minutes of meetings, letters, disciplinary codes, collective agreements, medical certificates, investigation reports, forensic reports and emails) and; real evidence (actual things like a stick used in an assault or bag used to remove goods from a store).

¹³ MS Sheppard *The Wolters Kluwer Bouvier Law Dictionary* Compact Edition (2011) 396

The primary function of the law of evidence is to provide for the determination of facts admissible to proving facts in issue, it further determines the method of adducing evidence, the rules for weighing the cogency of the evidence and the standard and onus of proof to be discharged before a party to litigation can succeed.¹⁴ The law of evidence also significantly lays down the rules applicable to the presentation of different types of evidence.

Evidence determines the facts admissible for proving facts in issue. Facts that are in issue are those facts which need to be proven to establish a case, these are known as *facta probanda*. Facts which are relevant to the facts in issue are facts which prove or counter those which are in issue and are known as *facta probantia*.

A golden rule of evidence is that a fact cannot be relied on unless it has been proved through a witness or document or it has been agreed to by the other side.¹⁵

All evidence is presented through a relevant witness as objects and documents do not speak and cannot be cross-examined to test the authenticity and veracity thereof.¹⁶

Evidence is not automatically deemed as proof. Evidence of a fact is only proof of that fact once a court has accepted it as such. This can only be done after evaluation by the court and after it is satisfied that such fact has been proved.¹⁷ There are various factors which have a bearing on the proof of a fact. These include the credibility of the witnesses, the intrinsic merits or demerits of the testimony itself, the reliability of their evidence, any inconsistencies or contradictions in the evidence, the existence of corroborative evidence and which party bears the burden of proof and on what standard that party is to discharge that burden of proof.

The three forms of evidence, namely: documentary evidence, oral evidence and real evidence will be discussed below.

¹⁴ CRM Dlamini *Proof Beyond a Reasonable Doubt* (LLD thesis, University of Zululand, 1998) 423-424

¹⁵ J Brand *Labour Dispute Resolution* 2 ed (2008) 206

¹⁶ PJ Schwikkard & S E Van der Merwe *Principles of Evidence* 3 ed (2009) 18

¹⁷ Ibid 19

2.3 Oral Evidence

Evidence in hearings is primarily received through oral evidence. Oral evidence is established through the testimony of a witness. Oral evidence generally comprises oral statements proffered by witnesses in the presence of the parties about the facts of the case. The rationale behind the practice of oral evidence is to present the parties with an opportunity to confront witnesses who are testifying against them. In this regard, the consistency of a witness's statement is of high relevance to the credibility of the witness and the reliability of the evidence.¹⁸

Oral evidence can be adduced in examination in chief or through cross-examination. Obtaining oral evidence in examination in chief is usually done through the question and answer technique.¹⁹ It must be noted that leading questions are prohibited because they tend to elicit a ready answer as the witness will readily conform to the party they favour in the proceedings.

Cross-examination is another process where oral evidence is given. This process forms part of a defense and is therefore essential in any proceedings.²⁰ It further provides an opportunity to challenge the evidence led by the witness, allowing the arbitrator to observe the candour of witnesses.²¹ The demeanour and responses of witnesses assist the arbitrator in making an assessment of the credibility of the witness. Failure to allow cross-examination constitutes gross irregularity on the part of a presiding officer.

2.4 Documentary evidence

Documentary evidence consists of written statements which are intended to be relied upon. These may include written agreements, employment policies, meeting transcripts, medical certificates, emails, SMSs and computer printouts. A witness usually has to be present to support the

¹⁸ Schwikkard PJ & van der Merwe SE *Principles of Evidence* 2 ed (2002) 341

¹⁹ Ibid 340

²⁰ Every accused person has a right to challenge evidence. This right is typically realized through cross-examination, except where hearsay evidence has been admitted in the interests of justice. See section 35(3) (i) of the Constitution of the Republic of South Africa 1996

²¹ Schwikkard & Van der Merwe (note 18 above) 362

documentary evidence. Thus, clarity can be obtained about the evidence, through questioning the witness. There are three rules that have to be complied with before a document can be admissible. These rules are: (1) the document must contain statements that are relevant and admissible; (2) the document must be proved to be authentic; (3) the original document must be produced.²²

2.5 Real Evidence

Real evidence is a term used to classify material objects that are produced for inspection by the courts. Therefore, a weapon used in the commission of a crime can be classified as real evidence.²³ However, real evidence becomes effective when a witness explains how a material object was used.²⁴ Thus, a witness brings clarity about the material objects produced as evidence.

2.6 Conclusion

This chapter discussed what evidence is and what it is used for. The different types of evidence were also discussed. It was pointed out that oral evidence is the starting point of adducing or eliciting any evidence. Documentary evidence is widely used because of the electronic systems used in most workplaces. Therefore, it makes up a substantial part of evidence used in labour disputes. Real evidence was mentioned to be material that is physical and usually requires a witness to give clarity on its significance. It is therefore important for arbitrators to know which type of evidence they are allowing, and how they will evaluate such evidence.

²² Ibid 372

²³ Definition of real evidence available at <http://legal-dictionary.thefreedictionary.com/Real+Evidence>

²⁴ Schwikkard & Van der Merwe (note 18 above) 366

Chapter 3: The standard and onus of proof in labour law

3.1 Introduction

This chapter will look at the standard of proof required in labour arbitration proceedings. It will be noted that arbitration proceedings have a lower standard than criminal proceedings and a discussion of this reasoning will be given. This chapter will also look at the onus of proof and the evidentiary burden that tends to shift during the course of the proceedings in arbitration.

3.2 The concept of the balance of probabilities

Section 192 of the LRA provides that in dismissal disputes, the employer must prove that the dismissal was fair and in unfair labour practices the employee applicant must prove the unfair labour practice.

In labour arbitration proceedings, the standard of proof required is on a balance of probabilities.²⁵ The arbitrator weighs the evidence of the two parties in dispute, and the party with the more probable version wins the case. If the evidence suggests that a fact is more likely than not, it is generally accepted that that fact has been proved.

In arbitration proceedings, it is generally accepted that the standard of proof is lower than in criminal proceedings where the standard is beyond reasonable doubt.²⁶ Lord Denning states that “It must carry a reasonable degree of probability but not so high as is required in a criminal case”.²⁷ In criminal proceedings, the judges have to have no doubt, based on the evidence, that the accused really did commit the offense. In arbitration proceedings, the evidence must be enough for the arbitrator to say that, based on the probabilities, the accused is guilty. If the standard of proof in civil or arbitration proceedings had to be beyond reasonable doubt, very few cases would be proved. For instance, in *Early Bird Farms (Pty) Ltd v Mlambo*²⁸, the respondent was dismissed because he was found on the company premises with no permission or valid reason for being there.

²⁵ Govender N, Khosa D, Letsoalo T, Moloi L. *CCMail* (2005) 13

²⁶ Schwikkard & Van der Merwe (note 18 above) 544

²⁷ Ibid

²⁸ (1997) 5 BLLR 541 (LAC)

On the day in question, the company's security guard searched the workshop and found boxes with approximately eighty raw chickens in them, folded in black plastic bags. The natural inference to be drawn from the facts, as found by the Court, was that one or more of the company employees had removed the chickens and placed them in the boxes with the intention of removing them from the premises. The Industrial Court had found that the dismissal of the respondent was unfair because there was no "absolute certainty" that he had knowingly been involved in the removal of the chickens. The Labour Appeal Court found that the onus of "absolute certainty" was unfounded because the appellant was simply required to prove, on a balance of probabilities, that the respondent had committed the misconduct, which the appellant had done. Therefore, it is justifiable to have a lower standard of proof in arbitration proceedings in order to maintain an expeditious resolution of disputes.

In summary, an employer must prove, on a balance of probabilities, that the dismissal was fair. In this respect the crucial question will be whether the employer's version (the sum of the evidence presented on his behalf) is more probable than not or more probable than the employee's version. In other words: whether the employer's version is the more likely version [more likely to be true]. In deciding which version is more probable, the arbitrator will need to consider questions of corroboration of evidence, credibility of witnesses, the intrinsic probability or improbability of their versions, the intrinsic merits or demerits of the testimony itself, the reliability of their evidence and any inconsistencies or contradictions in the evidence.

3.3 Onus of Proof

It is evident that in labour disputes, the employer usually dismisses the employee. When a dismissal occurs, the employer has to prove misconduct, incapacity or operational requirements and that the dismissal for either of these reasons was fair. This means the employer has the onus of proof and the duty to begin lies with the employer as well.²⁹ If the dispute is about an unfair labour practice, then the onus is on the employee and thus the duty to begin lies with the employee.³⁰ The duty to begin refers to one party leading evidence in support of its case first and

²⁹ Ismail R, Tshoose I, 'Analysing the Onus Issue in Dismissals Emanating from the Enforcement of Unilateral Changes to Conditions of Employment' (2011) 14 (7) *PELJ* 6-11.

³⁰ *Ibid* 12

the other party responding to such evidence. The onus is always on one party (the applicant) and refers to who bears the main burden of proof. If the applicant has dealt with evidence to an extent that he/ she is probably right, then the applicant would have discharged the onus.

3.4 Evidentiary Burden

In arbitration proceedings evidence is adduced by both parties to prove or disprove the testimony of the contending party. If one of the parties has adduced evidence opposing the other party's evidence or requiring the other party to answer to the evidence, the evidentiary burden shifts to the party who has to answer. However, the overall onus will remain on one of the parties. For instance, in an arbitration where an employee was dismissed, the employee only has to show that dismissal occurred. The overall onus would then be on the employer to prove that the dismissal was fair. Grogan³¹ defines the evidentiary burden as follows:

“The primary significance of the onus is that when the evidence on a point is evenly balanced or indecisive, the balance will tip against the party upon whom it rests. It must be noted, however, that the burden of proving a particular point may shift to the party not bearing the onus, on the basis of the principle that “he who alleges must prove”. So for example, if an employee accused of theft pleads an alibi, the burden rests on him or her to prove that he or she was elsewhere at the time of the commission of the offence. If he or she fails to discharge the evidentiary burden, it may be that the employer will be held to have discharged its overall onus”.

3.5 Conclusion

The significance of this chapter was to emphasize that there is a difference between the standard of proof between criminal, civil and labour arbitration proceedings. Due to the fact that the standard of proof in arbitration proceedings is based on a balance of probabilities, the importance of the concept of the balance of probabilities was highlighted. The onus and evidentiary burden are also issues of great importance because they keep arbitrators focused on who has the overall onus in light of the shifting evidentiary burden throughout the duration of the arbitration proceedings.

³¹ J Grogan *Workplace Law* 5th ed (2000) 111

Chapter 4: The conduct of arbitrations under the LRA

4.1 Introduction

This chapter will discuss how arbitrators should conduct arbitration proceedings. It will be pointed out that arbitrators have certain powers which are proffered by statute (the LRA). Thus, arbitrator's powers are limited to the confines of the law. Therefore, their discretion to conduct the arbitration proceedings should be applied in a manner that will be justifiable in terms of the law.

4.2 Powers of commissioners

A commissioner is given certain power in order to resolve a dispute quickly. Section 138 (1) of the LRA³² gives a commissioner the power to conduct an arbitration proceeding in a manner that he/she deems fit. The arbitrator must "deal with the substantial merits of the dispute with minimum of legal formalities".³³ This allows a commissioner to create an atmosphere that is less like that of a court of law such as the Labour Court. It should be noted that the CCMA is a statutory body that deals with numerous labour related disputes and it thus encounters a significant number of persons who are not well-versed in legal proceedings. The commissioner should therefore assist the parties where it is evident that they are not certain about how to conduct themselves, in terms of producing evidence and cross-examining the other party to the dispute.³⁴

In dealing with the substantial merits of the dispute, an arbitrator must ensure that all the relevant documents are produced. This may mean requesting the parties to elicit information they may not have raised or presented in their arguments.³⁵

It would not be correct to contend that section 138 of the LRA implies that commissioners do not need to be strict in the application of the law. It would be more harmonious to state that section 138 implies that rigid legal formalities should not be adhered to in arbitration proceedings. The

³² Act 66 of 1995

³³ Section 138 (1) of the Labour Relations Act

³⁴ An arbitrator may adopt an inquisitorial approach, where he/she does most of the questioning and determines the flow of evidence

³⁵ *Leboho v CCMA and others* (2005) 26 ILJ 883 (LC)

wording of section 138, “...with the minimum of legal formalities” means the arbitration proceedings should not be similar to that of a traditional court of law. However, what the arbitrator should do is deal with the substance of the dispute. Therefore, the arbitrator should focus on the arbitration itself and not on what strict processes a court would follow. In the case of *Gaga v Anglo Platinum Limited (Pty) Ltd and others*³⁶ the commissioner was found to have committed a gross irregularity due to rejecting similar fact evidence at the arbitration proceedings. The commissioner considered the fact that the evidence had not been tested since the person it was to be used against had not been convicted of those charges. However, the evidence was relevant to the dispute and thus, the commissioner should have admitted the similar fact evidence. The commissioner need not have given that evidence any weight because there had not been any conviction of the person it was to be used against.

In the case of *Naraindath v Commission for Conciliation Mediation and Arbitration and others*³⁷, the commissioner committed a reviewable irregularity by adhering strictly to the rules of evidence as set out in precedent established in civil courts. It should thus be noted that arbitration proceedings are not civil proceedings and the strict rules of civil proceedings should not be readily transferred to arbitration proceedings.

4.3 Conclusion

This chapter highlighted the powers of commissioners in terms of conducting arbitration proceedings. It also noted the difference between a civil proceeding and an arbitration proceeding. It is thus correct for a commissioner to create a less formal environment to that of a court of law, during the course of arbitration because of the nature of such a proceeding and for the accommodation of the parties to the dispute.

A discussion on the admissibility of evidence in arbitration proceedings will follow.

³⁶ (2012) 33 ILJ 329 (LAC)

³⁷ (2000) 21 ILJ 1151 (LC)

Chapter 5: Admissibility of evidence in arbitration

5.1 Introduction

This chapter will briefly discuss the important elements which allow for evidence to be admissible. Relevance is one of the elements that are required for the admissibility of evidence. It is logical that only evidence which is relevant to a particular case may be admitted. Reliability is another important element for evidence to be admissible. Arbitrators use evidence to determine a dispute. Therefore, the evidence which the arbitrator will rely on should assist the arbitrator him/her in doing so. Thus, there should be some form of indication that the evidence will be of such assistance before it is admitted.

5.2 Admissibility

Admissibility refers to whether a party may introduce a particular item of evidence at the hearing and/or whether the arbitrator must take such evidence into account. Evidence is either admissible or inadmissible as there are no degrees of admissibility.³⁸

5.3 Relevance and the reliability of evidence

Relevance can be classified as a prerequisite for admissibility.³⁹ Section 2 of the Civil Proceedings Evidence Act stipulates that:

“No evidence as to any fact, matter or thing which is irrelevant or immaterial and cannot conduce to prove or disprove any point or fact in issue shall be admissible”.⁴⁰

Therefore, no facts are relevant if no inferences, regarding the actual fact in issue, can be drawn from their existence. In essence, relevance is based on a presiding officer’s sense of reasoning and

³⁸ Schwikkard & Van der Merwe (note 18 above) 20

³⁹ Zeffertt DT & Paizes AP & St Q A Skeen *The South African Law of Evidence* (2003) 219

⁴⁰ Section 2 of the Civil Proceedings Evidence Act 25 of 1965

experience.⁴¹ However, a more substantial definition of relevance provides that any two facts are extremely related to each other that in the common course of events, one either on its own or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other fact.⁴²

In arbitration proceedings, there are usually two parties to a dispute. Each party has to give their own version of events or evidence explaining what happened. Ultimately, the arbitrator has to make a judgment based on the version which he believes had probably taken place. However, before an arbitrator can decide which version to believe, he must look at the credibility of the evidence and accordingly attach weight to that evidence. The evidence must be relevant before any weight can be attached to it.

Arbitrators are required to observe the most basic of the rules of evidence such as those relating to the onus of proof, standard of proof, relevance and privileged information. However, section 138 directs them to deal with the admissibility of evidence with a minimum of legal formalities.⁴³

Generally, if the evidence appears to be logically and legally relevant, arbitrators should admit it. There must be some advance indication that the evidence, if received, may assist the arbitrator in deciding the case. There should also be an indication that such evidence has the potential to shed light on what actually happened where there is a dispute of fact. The evidence should not lead to protracted investigations into collateral issues which, once determined, would be too remote and have little probative value with regard to the true issues. In some instances, the relevance of the evidence adduced will be immediately apparent, for example the testimony of an eyewitness to the disputed event. At other times, its potential will only emerge from a juxtaposition of the evidence in question and other pieces of known facts, for example hearsay evidence.⁴⁴

⁴¹ Ross D *Advocacy* 2 ed (2007) 109

⁴² Zeffertt *et al* (note 39 above) 220

⁴³ Bellengere *et al* *The Law of Evidence in South Africa: Basic Principles* Oxford (2013) 426

⁴⁴ *Ibid* 426

5.4 Conclusion

This chapter discussed the requirements for the admissibility of evidence. It pointed out that in labour law the general principle is that evidence is admissible if it is relevant (material) and reliable (credible). Thus, arbitrators should take note of these elements before admitting any evidence.

The following chapter will discuss the evaluation of evidence and also point out that even though some evidence is admitted, it should not be presumed that it will influence the arbitrator in reaching a decision about the dispute.

Chapter 6: The evaluation of evidence in arbitrations

6.1 Introduction

The admission of evidence requires that the arbitrator look into the issue of relevance and reliability. However this is not enough for the arbitrator to make an award. He/she will have to determine what weight the evidence should be given. Thus a further step has to be taken after the evidence has been admitted. This step requires the arbitrator to evaluate the evidence. This chapter will discuss this important stage in the process of resolving, or attempting to resolve a labour dispute.

6.2 The Evaluation of Evidence

The fact that evidence is admitted does not mean that it is automatically true or even particularly persuasive. It is still open to the arbitrator to find that certain evidence, which he or she admitted, is untrue, unreliable or improbable and should be rejected. Alternatively, the arbitrator may find that certain admitted evidence, while constituting proof, does not carry much weight.⁴⁵

Once the evidence and concluding arguments have been presented, the arbitrator must evaluate all the evidence together to determine the facts of the case. In other words, the arbitrator must evaluate which relevant facts have been admitted or proved, and what inferences he or she can draw from these facts. In addition, the arbitrator must evaluate whether the party who bore the onus of proof has sufficiently proved all the elements of its case and has a more probable version than the other party.⁴⁶

Section 56 of the CCMA Guidelines states that:⁴⁷

“An arbitrator must weigh the evidence as a whole taking account of the following factors:

⁴⁵ Bellengere *et al* (note 43 above) 435

⁴⁶ Ibid 426

⁴⁷ CCMA Guidelines: Misconduct Arbitration. Notice 602 of 2011

56.1 The probabilities. This requires a formulation of the contending versions and a weighing up of those versions to determine which is the more probable. The factors for that determination have to be identified and justified.

56.2 The reliability of the witnesses. This involves an assessment of the following:

56.2.1 the extent of the witness's first-hand knowledge of the events;

56.2.2 any interest or bias a witness may have;

56.2.3 any contradictions and inconsistencies;

56.2.4 corroboration by other witnesses and;

56.2.5 the credibility of the witness, including demeanour”.

The Labour Court, in *Sasol Mining (Pty) Ltd v Ngqeleni and Others*⁴⁸ pointed out that when resolving disputes of fact, the proper approach is to make findings based on:

- 1) the credibility of witnesses;
- 2) the inherent probability or improbability of the version that is proffered by the witnesses;
- 3) the reliability of their evidence and;
- 4) an assessment of the probabilities of the irreconcilable versions before the arbitrator.

Only then can the arbitrator make a finding on whether a party has discharged the onus of proof. If none of this is done, the arbitrator has manifestly failed to resolve the dispute.

The recent Labour Court review judgment in *Solidarity obo Van Zyl v KPMG Services (Pty) Ltd and Others* (LC)⁴⁹ clearly illustrates the role of arbitrators in evaluating evidence in statutory arbitrations. The question posed by the court in this review application was: to what extent does an arbitrator's error in assessing the credibility of witnesses when faced with two mutually destructive versions, renders such an award reviewable?

⁴⁸ (2011) 32 ILJ 723 (LC)

⁴⁹ Unreported case no JR960-12 (Fourie AJ)

The applicant was dismissed for allegedly uttering a racial slur while in the presence of three fellow employees. One of the employees reported the incident. At a disciplinary hearing, the employee testified to what she had heard and, despite the applicant denying the allegation, he was found guilty and dismissed. In the arbitration proceedings, the employer led the evidence of the employee who had laid the complaint. The applicant again denied the allegations and led the testimony of the other two employees who had been present. Both employees denied having heard the applicant make these remarks.

Faced with these mutually destructive versions, the arbitrator accepted the version of the employer witness over that of the applicant and his witnesses. The arbitrator based his findings on the sole ground that no reason could be advanced as to why the employer witness would fabricate her version, especially in light of the fact that there was no ‘bad blood’ between the applicant and the employer witness.

On review it was argued that the arbitrator failed to assess the credibility of any of the witnesses when arriving at his decision. On review, the court referred to the judgment of *Stellenbosch Farmer’s Winery Group Ltd and Another v Martell et Cie and Others*⁵⁰ wherein the SCA laid out the accepted test applicable to both a trial court and an arbitrator when faced with a factual dispute.

According to the judgment⁵¹ the court had to come to a conclusion on the disputed issues by making findings on:

- 1) The credibility of the various factual witnesses;
- 2) Their reliability;
- 3) The probabilities.

The court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. This finding will, in turn, depend on a variety of factors such as:

- 1) The witness’s candour in the witness box;
- 2) His or her bias- latent or blatant;
- 3) Internal contradictions in his or her evidence;

⁵⁰ (2003) 1 SA (11) SCA

⁵¹ *Stellenbosch Farmer’s Winery Group Ltd and Another v Martell et Cie and Others* (2003) 1 SA (11) SCA at para 5

- 4) External contradictions with what was pleaded or put on his behalf, or with established facts or with his or her own extra-curial statements or actions;
- 5) The probability or improbability of particular aspects of his or her version; and
- 6) The calibre and cogency of his or her performance compared to that of other witnesses testifying about the same incident or events.

A witness's reliability will depend, apart from some of the factors above, on:

- 1) The opportunities he or she had to experience or observe the event in question; and
- 2) The quality, integrity and independence of his or her recall thereof.

Finally, an analysis and evaluation of the probabilities and improbabilities of each party's version on each of the disputed issues are necessary components in coming to a conclusion. In light of its assessment of all the above factors the arbitrator will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it.

While acknowledging the above approach to be sound in law, on review the Labour Court in *KPMG Services*⁵² pointed out that this approach needs to be exercised with caution. To apply this onerous test to reviews of arbitrations conducted in terms of the LRA could blur the distinction between appeals and reviews. This onerous approach would also go against the strict review test set out by the Constitutional Court in *Sidumo*⁵³ and re-affirmed by the SCA in *Herholdt v Ned Bank Ltd and Another*⁵⁴.

The test as to when the Labour Court will interfere with a CCMA award, often referred to as the Sidumo test, has been recently restated by the SCA in *Herholdt*⁵⁵ in the following terms:

“In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2) (a) (ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only

⁵² *Solidarity obo Van Zyl v KPMG Services (Pty) Ltd and Others (LC)* Unreported case no JR960-12 (Fourie AJ)

⁵³ *Sidumo v Rustenburg Platinum Mines Ltd* (note 10 above)

⁵⁴ (2013) 11 BLLR 1074 (SCA)

⁵⁵ *Herholdt v Ned Bank* (note 10 above) at para 25

be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.”

In light of this review test, the Labour Court held that it is not axiomatic that an award wherein an arbitrator failed to properly apply the *Stellenbosch Farmers’ Winery* evaluation test, is reviewable for this reason alone.

The court held:

*“While arbitrators should always aspire to meet the exacting standard set by the SCA in Stellenbosch Farmers’ Winery for proper assessment of conflicting versions, an arbitration award that does not live up to this standard will not automatically be subject to review. Arbitrators are empowered to deal with the dispute with a minimum of legal formalities, the decisions are immune from appeal, and the legislature has set a high bar for reviewing arbitration awards. Errors committed by an arbitrator in the assessment thereof will not necessarily vitiate an award.”*⁵⁶

With this test in mind, the court then assessed the review application and found that by failing to assess the credibility of any of the witnesses, the arbitrator fell short of the standard aspired to in *Stellenbosch Farmers’ Winery*. However, this alone did not render the award reviewable without first considering whether the decision fell within the band of reasonableness. Further to this, it was not necessary for the arbitrator to have found the applicant and his or her witnesses unreliable for him or her to find their versions improbable. In this regard the court referred to the Labour Court judgment of *Transnet Ltd v Gouws and Others* (LC)⁵⁷.

The review court found that factors, as recorded in the proceedings, which support a finding that it was improbable for the employer’s witness to have fabricated her version were:

⁵⁶ Stellenbosch Farmer’s Winery (note 51 above) at para 17

⁵⁷ Unreported case no JR206/09, 25-4-2012) at para 11-20

- 1) The complainant did not initially mention the applicant's name in her complaint and intended the employer to send a general instruction for employees to divest from such behaviour.
- 2) The employer disciplined the applicant after an investigation and not at the behest of the complainant witness.
- 3) The complainant was reluctant to participate in the disciplinary and arbitration hearings and did not intend for the applicant to be dismissed.

In light of the above, the court held that in finding the employer's version more probable, the arbitrator's decision was not one that a reasonable arbitrator could not come to, given the evidence before him or her. The review application was dismissed.⁵⁸

6.3 Conclusion

This chapter discussed the evaluation of evidence as a step taken by arbitrators after they admit evidence. This process determines how much weight should be given to certain evidence. It also helps an arbitrator make a decision on the outcome of the arbitration. The CCMA guidelines provide as good assistance to arbitrators when evaluating evidence. The important issues to be determined by an arbitrator, as mentioned above, are a witness's credibility, reliability and the probabilities based on versions given by all the witnesses. It is therefore important to look into a witness's veracity and his/her reliability before coming to a decision about the overall dispute.

⁵⁸ See *Solidarity obo Van Zyl v KPMG Services (Pty) Ltd and Others*: De Rebus, December 2013 at 46

Chapter 7: Hearsay Evidence in arbitration proceedings

7.1 Introduction

This chapter will discuss hearsay evidence in the context of labour arbitration. It will look at the law⁵⁹ which regulates the admissibility of hearsay evidence in any proceedings. It will be noted that arbitration proceedings are not criminal or civil proceedings and thus the standard in arbitration proceedings should be lower than that of civil proceedings. Case law will be used to give a proper analysis of the provisions of section 3 (1) (c) of the Law of Evidence Amendment Act⁶⁰. It will be pointed out that the common law with regard to hearsay evidence still finds a certain amount of significance in light of the new hearsay rule.

7.2 Defining hearsay evidence

The common law definition of hearsay evidence has been replaced with a statutory definition. Hearsay evidence is defined in the Law of Evidence Amendment Act as:

“Evidence whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence”.⁶¹

It affirms that what is being said is second hand.⁶² This means the person who tenders hearsay evidence is not the originator of that evidence.

Generally hearsay evidence is inadmissible because the witness who made the statement is not in court and under oath, the witness's claims cannot be tested through cross-examination and the court is not able to observe the demeanour and evaluate the credibility of the witness who made the statement.⁶³ It is problematic because the adversely affected party cannot precisely get to the root of the matter by asking specific questions that might convey loopholes in the testimony of the

⁵⁹ Section 3 of the Law of Evidence Amendment Act 45 of 1988

⁶⁰ Act 45 of 1988

⁶¹ Section 4 of the Law of Evidence Amendment Act 45 of 1988; See also Schwikkard & Van der Merwe (note 18 above) 255.

⁶² A Taylor *Principles of Evidence* 2 ed (2000) 161

⁶³ Bellengere *et al* (note 43 above) 304

originator. The inability to cross-examine may amount to insufficient facts being obtained about a past event, and no certainty can be obtained. Ultimately, the chair in a proceeding is faced with a problem in terms of making inferences that might help him/her get to the truth of the matter and make a conclusion from such truth. A decision maker, such as a judge or arbitrator would have difficulty making a judgment or an award due to the lack of certainty about the evidence rendered to assist in making of a decision or award.

7.3 The admissibility of hearsay evidence

Section 3 of the Law of Evidence Amendment Act⁶⁴ allows for exceptions to inadmissibility of hearsay evidence. This section specifically outlines the factors to be considered before hearsay evidence is admitted.⁶⁵

Section 3 of the Law of Evidence Amendment Act⁶⁶ reads as follows:

- (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-
 - (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
 - (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
 - (c) the court, having regard to-
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

⁶⁴ Law of Evidence Amendment Act 45 of 1988

⁶⁵ Rand Water v Legodi NO & others (2006) 27 ILJ 1933 (LC)

⁶⁶ Act 45 of 1988

- (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.
- (2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.
- (3) Hearsay evidence may be provisionally admitted in terms of subsection (1) (b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.
- (4) For the purposes of this section-
- 'hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence; 'party' means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.

7.4 Applicability of section 3 of the Law of Evidence Amendment Act in labour matters

In *Mosimo v SA Police Service & others*⁶⁷, the commissioner allowed hearsay evidence based on the provisions of section 3.

The applicability of the provisions of section 3 (1) of the Law of Evidence Amendment Act will be discussed below. Case law, especially in labour law, will be used to illustrate the application of the provisions.

⁶⁷ *Mosimo v SA Police Service & others* (2012) 33 ILJ 1225 (LC)

7.4.1 The nature of the proceedings

This provision requires a presiding officer to take into consideration the nature of the proceedings when making an admissibility ruling. In criminal proceedings the test for the introduction of hearsay will be more stringent because of the presumption of innocence and the high standard of proof necessary, namely ‘beyond a reasonable doubt’. It follows that the test will be less stringent in civil proceedings and thus lesser in arbitration proceedings where the rules of evidence are not strictly adhered to.⁶⁸ In terms of section 138 of the Labour Relations Act, the rule against the admission of hearsay evidence applies less strictly in arbitrations.

In *Naraindath v CCMA and Others*⁶⁹ the employer relied on a transcript of testimony given at a disciplinary hearing without calling the witnesses. The employee did not challenge the evidence at the disciplinary hearing as he and his representative had withdrawn at the start of the hearing. Wallis AJ found that it was not irregular for the arbitrator to have continued the arbitration once this evidence had been placed before him by looking to the employee for an explanation of his stance regarding the charges. Depending on the explanation, the arbitrator would then be able to decide whether or not it was necessary for the witnesses to be called to the arbitration.

7.4.2 The nature of the evidence

This provision is primarily concerned with the reliability of evidence.⁷⁰ The courts look at the following factors when determining reliability:

- 1) Was the person making the hearsay statement telling the truth? For example: Was the statement made voluntarily and spontaneously? Is it against the interests of the person? Does it pre-date the subject matter of the litigation? Did the person have a motive to lie? Does the person have a reputation for honesty?

⁶⁸ *Naraindath v Commission for Conciliation Mediation and Arbitration and others* (2000) 21 ILJ 1151 (LC)

⁶⁹ Ibid

⁷⁰ Schwikkard & Van der Merwe (note 18 above) 261

- 2) Did the person accurately remember and describe the events making up the statement?
For example: What period of time has elapsed since the making of the statement? Are the events described by the person making the statement first hand or second hand, spontaneous, vivid, dramatic, simple or complex, unusual and unlikely to be forgotten? Does the event(s) concern the person's own affairs or those of another?
- 3) Did the person properly see or hear the event(s) making up the statement? For example: Was there an opportunity for a clear and accurate observation of the events making up the statement? Does the person have poor eyesight or hearing? Is the court in a position to assess the person's perceptive powers accurately? Is there corroborating evidence supporting the accuracy of the statement?
- 4) Was the person lucid and coherent when making the statement? For example: Is the statement oral or written? Is the statement vague and susceptible to inaccurate transmission or explanation?⁷¹

Employers often rely on forensic or other business reports made up of documents created by more than one person. In *Foschini Group v Maidu and Others*⁷² the Labour Appeal Court held that, given section 138, an arbitrator had not acted in an irregular manner by admitting and treating a financial manager's testimony as reliable when part of the forensic report he had presented was hearsay. This was because the forensic report was derived from records maintained by the stock controllers who were not called as witnesses. Also, there was no plausible suggestion that the data recorded by the stock controllers was false or inaccurate.

In *LA Consortium and Vending CC t/a LA Enterprises and Others v MTN Service Provider (Pty) Ltd and Others*⁷³ the Court held that decision makers may rely on the evidence of a witness who was not personally involved in making any of the inputs to an electronic business report he or she was presenting, but who could analyse, understand and draw conclusions from the

⁷¹ Bellengere *et al* (note 43 above) at 298

⁷² *Foschini Group v Maidu and Others* (2010) 31 ILJ 1787 (LAC)

⁷³ (2011) 4 SA 577 (GSJ)

data generated by the employer's systems. The margin of error in effecting electronic entries is minimal and will generally be made by employees acting within the scope of their employment. The fact that more than one person contributed to their existence does not constitute a valid objection to the admission of data messages into evidence and the court affording them 'due weight'.

Employees often rely on medical certificates and reports as evidence at hearings. These should ordinarily be admissible where the employee (patient), as the recipient of the certificate, testifies to its authenticity and the correctness of the circumstances under which it was produced. However, where the employee wishes to rely on the disputed contents about which he or she has no specialised knowledge, the contents will be hearsay in the absence of the doctor's testimony. Generally, 'hearsay' certificates can be taken into account where they are offered to corroborate a version.⁷⁴

Thus, hearsay evidence may generally be admissible, but the weight afforded to that evidence should be considered in light of the nature of the evidence. In other words, due to the evidence being hearsay, the weight given to such evidence will be affected. Ultimately, its reliability will, to a large extent, determine the weight that will be given to the evidence.

7.4.3 The purpose for which the evidence is tendered

This provision requires a judicial officer to have regard to the intention behind the introduction of the hearsay evidence. In other words, if the evidence is central to proving a case against the accused, the officer must not readily admit and rely on the evidence unless there are compelling justifications to do so.⁷⁵ On the other hand, if the evidence is to be introduced to prove a subsidiary issue or to corroborate other evidence, then less scrutiny is required by the officer when deciding whether or not to admit the evidence.

⁷⁴ Bellengere et al (note 43 above) 427

⁷⁵ *S v Ramavhale* 1996 1 SACR 639 (A)

In the case between *POPCRU obo Maseko v Department of Correctional Services*⁷⁶ the applicant (Maseko) was a prison warder who had allegedly given two prisoners, who were awaiting trial, drugs to sell in the prison. At the disciplinary inquiry, the two prisoners gave testimony stating that the applicant was guilty of giving them drugs to sell in the prison. Their evidence was also recorded in signed affidavits. The applicant did not challenge the disciplinary inquiry on grounds of unfairness. He also had the opportunity to cross-examine the prisoners. He was found guilty and dismissed. The matter went for arbitration. The two witnesses had given false information about their whereabouts and could not be located. The arbitrator relied on the signed affidavits and found the dismissal to have been fair. The applicant then took the matter for review on the grounds of the evidence being hearsay and unauthenticated documentary evidence. The applicant argued that the commissioner relied on the statements as the only evidence to confirm his dismissal. However, the Labour Court stated that the commissioner had not erred in doing so because there was strong surrounding evidence that supported the hearsay statements.⁷⁷ The Court found that the arbitrator realized the centrality of the hearsay evidence and its decisive nature and that amounted to a compelling factor that justified its admission.⁷⁸

7.4.4 The probative value of the evidence

This provision is closely related to the reliability and relevance of the hearsay evidence. The purpose of arbitration is to deal with a matter in the most efficient manner. If the arbitrator finds it necessary to admit hearsay evidence to help him to come to a conclusion about the facts of a case, then there is no reason why he cannot do so.

In the case of *The Foschini Group v Maida & Others*⁷⁹ there had been a shortage or loss of stock at one of the branches of the Group's clothing stores. During an investigation by the applicant's manager⁸⁰, the respondents submitted that the store had been broken into and that caused the loss

⁷⁶ (2011) 2 BLLR 450 (LC)

⁷⁷ *POPCRU v Department of Correctional Services* (2011) 2 BLLR 450 (LC) at para 61-63

⁷⁸ *Ibid* at para 74

⁷⁹ (2010) 31 ILJ 1787 (LAC)

⁸⁰ Mr Wilson was the applicant's only witness who was told directly by the respondents that the stock loss was a result of the recent break-in

of stock. However, the loss had been noted a month before the alleged break-in. Alarm records provided by the security company responsible for the store's security system, were admitted into evidence, even though the witness was not the originator of the records, because of their high probative value and were thus used to disprove the facts of the respondents that the clothing store had been broken into, which resulted in the loss of stock. In other words, the trustworthiness of the security company gave the evidence a high probative value. The probative value of the witness's evidence was further enhanced by the fact that the respondents did not report the break-in to the Group's head office. Furthermore, the evidence of a break-in, as provided by the respondents, was found to be irrelevant because that incident occurred after the stock losses were discovered. The applicant's witness also furnished documentary evidence showing that after the respondents were dismissed, the store's stock losses decreased significantly.⁸¹

This case is a prime example of how the probative value of hearsay evidence can be obtained from the credibility of the originator even though such a person is not a witness in a matter. This case also demonstrates how the weight of the hearsay evidence can be enhanced by the production of other evidence that corroborates the hearsay.

7.4.5 The reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends

The admissibility of the evidence will also depend on whether there are acceptable reasons for the failure of the person making the statement to testify. Good reasons may include that the person's whereabouts are not known, the person has died, issues of safety are in issue and/or the person is beyond the subpoena power of the party.

In the case of *CWU v SA Post Office*⁸², the applicant, represented by a union, had been dismissed by the respondent for allegedly engaging in a fraudulent act where it was assumed that a customer had paid for her account, and the applicant had cancelled the receipt and kept the customer's

⁸¹The Foschini Group v Maidi (note 72 above) at para 21; Part VI of The Civil Proceedings Evidence Act 25 of 1965, allows for the admissibility of hearsay evidence in the form of a document.

⁸² (2009) 30 ILJ 430 (CCMA)

payment in her possession. At the arbitration proceeding, the respondent had the customer as one of its witnesses, who was not present, on two occasions, due to an illness. However, she had made a statement regarding the dispute, which was admitted into evidence because it was relevant evidence. It had also met the requirement for documentary evidence to be admissible.⁸³ The applicant presented evidence in person and called no other witnesses. The applicant's evidence was capable of being tested by cross-examining the applicant. However, the respondent's evidence was not able to be tested because the witness had not attended the proceedings and the truth of her statement was not determined because the witness was not cross-examined. Thus, her statement was afforded little weight, if any. This was due to the fact that the statement was made by a person whose credibility was questionable and therefore, its probative value was consequently diminished.

In this matter, there was a legitimate reason why the hearsay was submitted into evidence. However, due to the fact that the respondent's witness could not be cross-examined, and had failed to attend the proceedings on two occasions, the hearsay evidence could not be given much weight. The applicant in her evidence also demonstrated the respondent's witness to be untrustworthy by not returning to her, on the day in question. This meant that no probative value could be attached to the hearsay evidence given by the respondent's witness.

In *Food & Allied Workers Union on behalf of Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River*⁸⁴, the court stated that the hearsay statements of witnesses were going to be admissible as evidence. These statements were made by persons who had witnessed violent acts perpetrated by their colleagues. Due to fear for their lives, they had refused to testify in the presence of the perpetrators. However, one of the perpetrators had given evidence on who was involved in the violent acts and what plans they had made to further engage in acts of violence. That witness had disappeared on the morning of the day he was due to testify. All the evidence collected by the respondent employer amounted to reliable evidence because of the intense circumstances it was given under; the witnesses were corroborating each other's statements; no

⁸³ Refer to "documentary evidence" in chapter 2

⁸⁴ (2010) 31 ILJ 1654 (LC)

contradictory evidence was adduced and; one of the witnesses had furnished evidence which would have ultimately implicated him for partaking in the violent acts.

As all the provisions of section 3 (1) (c) should be considered (although not exhaustively) when deciding whether or not to admit hearsay evidence, subsection (1) (c) (v) should have satisfied the presiding chairperson to admit the hearsay statements because the reason why the person whose credibility the probative value of the evidence depends, did not testify, was fear for their lives due to the violence that was taking place at the time. Fear for one's life, after people had been threatened and harmed, is a credible explanation for not being present to give evidence.

It would also have been in the interests of justice to admit such evidence (as envisaged by subsection (1) (c) (vii)) because if it was not admitted, the perpetrators of violent crimes would feel that they can do as they please and not be punished for doing so. It would thus send the wrong message to employees in other employment that violence in labour relations is a permissible measure they can use to make their employer concede to their demands.

In *Naraindath v CCMA and Others*⁸⁵ the employer relied on a transcript of testimony given at a disciplinary hearing without calling the witnesses. The employee did not challenge the evidence at the disciplinary hearing as he and his representative had withdrawn at the start of the hearing. Wallis AJ found that it was not irregular for the arbitrator to have continued the arbitration once this evidence had been placed before him by looking to the employee for an explanation of his stance regarding the charges. Depending on the explanation, the arbitrator would then be able to decide whether or not it was necessary for the witnesses to be called to the arbitration.

7.4.6 Any prejudice to a party which the admission of such evidence might entail

The prejudice referred to in this provision, regards any procedural unfairness arising from the inability to cross-examine the declarant of the evidence.⁸⁶

In the matter between *Edcon and Pillemer*⁸⁷, the commissioner had relied on documents authored by the applicant's managers. The documents referred to the applicant's employee (Reddy) who

⁸⁵ *Naraindath v CCMA* (note 68 above)

⁸⁶ PJ Schwickard 'The Challenge of Hearsay' (2003) 120 (63) *SALJ* 66

⁸⁷ *Edcon Ltd v Pillemer NO* (2008) 29 ILJ 614 (LAC)

had a clean record for seventeen years and further stated that Reddy's misconduct should not amount to a dismissal. Reddy was dismissed for failing to report that the applicant's company car had been involved in an accident. Her son was driving the car when the accident occurred. She decided to repair the car at her own expense and not report the accident because she assumed giving the car to her son was not allowed by the applicant's policy. However, the same incident had occurred before, but in that case the employee was not dismissed. Instead, the employee was required to pay for the car's damages. One of the applicant's managers requested that the same treatment (payment for damages) be afforded to Reddy so as to maintain consistency in implementing disciplinary measures.

The applicant had challenged the commissioner's decision based on the ground that she had relied on the documents without the author's testimony regarding the documents and the lack of an opportunity to cross-examine the author's. The Court found that the absence of testimony by the authors could not have any potential prejudice to the applicant because the authors were employed by the applicant and thus, it would have been easier for the applicant to call them as witnesses. It further found that the applicant had not raised any objection to the documents during an internal inquiry. Therefore, the commissioner's reliance on the documents, which constituted hearsay evidence, did not have any prejudicial effect on the applicant.

7.4.7 Any other factor which should in the opinion of the court be taken into account and the court is of the opinion that such evidence should be admitted in the interests of justice

This section requires an arbitrator or a judge to be mindful of the fact that although the common-law exceptions to the hearsay rule are obsolete, they are nonetheless still relevant. These exceptions may be taken into account by an arbitrator or judge when exercising its discretion to admit the evidence in the interests of justice. One of the common law exceptions to the hearsay rule is that the evidence of a witness in former proceedings is admissible in subsequent civil proceedings between the same parties that involve substantially the same issues, provided the witness is not available to testify and the opposition has had the opportunity to cross-examine the witness.⁸⁸ In

⁸⁸ Schmidt CWH, Zeffertt DT & van der Merwe DP "Evidence" in WA Joubert (ed) *LAWSA* 9 (1996) para 521

*POPCRU obo Maseko v Department of Correctional Services*⁸⁹, the witnesses had testified in the disciplinary hearing where the applicant had the opportunity to cross-examine the witnesses. The issues that were dealt with were the same as in the arbitration. There was a legitimate reason why the witnesses could not be called to testify at the arbitration proceedings. These reasons were regarded by the Court as strong reasons for admitting the evidence.

7.5 Conclusion

It has thus been shown that factors such as reliability, corroboration and the testimony of other witnesses are essential in determining the admissibility of hearsay evidence and that it is only when the hearsay evidence fits into the overall jigsaw of hard facts that have been presented, that it may assume significant weight.⁹⁰ It may also be used to corroborate other admissible evidence. In general these factors should apply and do apply in arbitration proceedings. The fact that the strict rules of evidence need not be applied does not mean that an arbitrator should not be cautious and only admit reliable and relevant hearsay evidence.

Although the common law has become obsolete, it is still relevant in some aspects of the reformed hearsay rule.

Even though a presiding officer in arbitration has the discretion to admit or reject evidence, that discretion should be limited within the confines of the law. The presiding officer in an arbitration proceeding must consider all the factors set out in section 3 of the Law of Evidence Amendment Act. Thus, the decision to admit the hearsay evidence will be in the interests of justice if the presiding officer has admitted the evidence in cognisance of the factors in favour and against the admission of the hearsay evidence. Therefore, an arbitrator's discretion will be justly exercised if it can be shown that the powers of the arbitrator were not exceeded by showing that it was restricted to the requirements of the law.

⁸⁹ 2011 2 BLLR 450 (LC)

⁹⁰ Bellengere *et al* (note 43 above) at 427

Chapter 8: Entrapment

8.1 Introduction

This chapter will look at entrapment, in the context of labour law, and the admissibility of evidence obtained by trapping an employee. Entrapment is a technique used with the intention of identifying an employee who is committing misconduct in the workplace, where for instance, there is an apparent shortage of stock.⁹¹ Entrapment takes place when the employer engages ‘agents’ to conclude ‘deals’ with employees involving illicit transactions. It entails cooperating with an employee in the commission of an offence. A ‘trap’ is a person or an agent who proposes criminal conduct to an employee and takes part in it with the intention of incriminating the employee.

The Labour Court has held that section 252A of the Criminal Procedure Act⁹² (CPA) may be used as a guide on how a trap should be administered.⁹³

An employer has to have a legitimate reason for using this technique. In order for evidence obtained from a trap to be admissible and have any weight, it should be supported by other evidence against the trapped employee(s), which could be the reason for undertaking the entrapment exercise.⁹⁴ The trap should only create an opportunity for the targeted employee, to commit an offense. If there is anything beyond the creation of that opportunity, the evidence from the trap may be inadmissible.⁹⁵ The reasoning behind this inadmissibility is that an innocent employee might be induced to commit the offense while being subjected to the traps persuasive conduct. It is assumed that an employee who is open to committing misconduct will readily agree to do so when the opportunity presents itself. Therefore, if such an employee is given the opportunity, he/she will commit the offense at the first given opportunity. This is the rationale behind the mere creation of an opportunity, and nothing beyond it.

⁹¹ Schwikkard & Van der Merwe (note 18 above) 246

⁹² Criminal Procedure Act 51 of 1977

⁹³ *Cape Town City Council v SAMWU and others* (2000) 21 ILJ 2409 (LC)

⁹⁴ J Grogan *Dismissal, Discrimination and Unfair Labour Practices* (2007) 329

⁹⁵ Section 252A 3(b) of the Criminal Procedure Act 51 of 1977

8.2 Purpose for using entrapment

It is important that an employer has a reason for requiring a trap before it uses that trap. An employer cannot simply require a trap in the absence of a legitimate reason because in order for an employer to establish and win a case, it has to show a valid reason for entrapping an employee. The evidence obtained from a trap should be supported by other evidence against the trapped employee(s), which could be the reason for undertaking the entrapment exercise.⁹⁶

8.3 Admissibility of evidence obtained from entrapment

Section 252A of the Criminal Procedure Act⁹⁷ provides a guideline for entrapment in the employment context. In *Mbuli and Spartan Wiremakers CC*⁹⁸ the arbitrator stated the factors, listed in subsection 252A (2) of the Criminal Procedure Act which may be relevant in the employment context, as the following:

- 1) *“The nature of the offence - taking into account the prevalence of the offence and the seriousness of the offence;*
- 2) *the availability of other techniques for the detection, investigation or uncovering of the commission of the offence, or the prevention thereof;*
- 3) *whether an average person in the position of the accused would be induced to commit the offence;*
- 4) *the degree of persistence and number of attempts made before the accused succumbed and committed the offence;*
- 5) *the type of inducement used including the degree of deceit, trickery, misrepresentation or reward;*
- 6) *the timing of the conduct - whether the trapper instigated the offence or became involved in an existing unlawful activity;*

⁹⁶ J Grogan (note 94 above) 329

⁹⁷ Act 51 of 1977

⁹⁸ (2004) 5 ILJ 1128 (BCA)

- 7) *whether the conduct involved the exploitation of human characteristics such as emotions, sympathy or friendship or an exploitation of the accused's personal, professional or economic circumstances;*
- 8) *whether the trapper or agent has exploited a particular vulnerability of the accused such as a mental handicap or a substance addiction;*
- 9) *the proportionality between the involvement of the agent as compared to that of the accused;*
- 10) *any threats implied or expressed against the accused;*
- 11) *whether before the trap was set there existed any suspicion based upon reasonable grounds that the accused had committed a similar offence and;*
- 12) *whether the agent acted in good faith or bad faith”.*

In this case, the applicant had been collaborating with another employee to illegally remove company property and sell it at a lower price. The applicant had been reported by other employees for illegally removing company property and selling it. The employer had a legitimate reason for opting to entrap the applicant. Other measures had been taken by the employer prior to resorting to the use of a trap.⁹⁹ The trap had merely provided an opportunity for the applicant to commit the offense, and did not induce the applicant into committing the offense. The only inducement used by the trap was financial reward which the applicant had been obtaining through his normal conduct of selling the company's property. The financial reward was therefore one of the measures used by the trap to uncover whether the applicant had in fact been one of the employees responsible for the stock shortage. The evidence of entrapment was thus admissible.

Labour relations should be based on fairness. Labour laws provide, and should be used, as a mechanism to ensure that employees and employers enjoy fair labour relations. Loss of an employer's property tilts the scale of fairness in favour of employees, at least in instances of

⁹⁹ The employer had replaced its own security staff with an external security company to control access gates and reinforce the perimeter fencing. The employer had also introduced regular morning security checks outside the perimeter fence to find company products, which might have been thrown over the fence during the night for collection by the culprits at a later stage. The employer had invited employees to provide information about the theft, and offered a reward for that information.

company property theft caused by employees. Entrapment can thus be used as a mechanism to afford employers the opportunity to deal with theft of their property.

In *Cape Town City Council v SAMWU and others*¹⁰⁰ the Court found that the evidence obtained in the trap *in casu* (what the employees did and said during the trap and the information uncovered by the agent) was inadmissible because there was no proper pre-existing suspicion about the employees. In addition, the agent had exceeded the bounds set by section 252A of the Criminal Procedure Act by actively encouraging and unduly inducing the employees to commit the offence. The court held that the onus rests on the employer to show that the trapping was fairly conducted.

In the matter between *Caji and Africa Personnel Services Pty (Ltd)*¹⁰¹, the applicant was dismissed after he was captured on video removing company property without authorization. An investigator working in a different company located in close proximity with that which the applicant worked for, had created a trap for the applicant. He allegedly convinced the applicant to sell him buckets and a pool filter. According to the investigator, the applicant had agreed to sell him the items and had removed those items from his workplace by jumping over the perimeter fence in the presence of the investigator. After the items were loaded in the investigator's vehicle, the applicant was paid an amount of money. All of this was captured on video. The video was then sold to the owner of the items. Consequently, the applicant was dismissed. The matter went to the CCMA for arbitration. In these proceedings, the applicant gave a different version of events, particularly the night in which the items were removed from the applicant's workplace. He alleged that the investigator had forced him to remove the items after he had attempted several times to convince the applicant and another employee to obtain the items and sell it to him at a lower price.

The arbitrator found that, in the instance where there are contradicting versions, the employer bears the onus of proving that the employee was not coerced to commit an offense and that he was not provided more than an opportunity to commit the offence. The investigator had not put the events, leading to the night in question (where a video recording was made), on record. This worked against his credibility as he was a professional investigator with vast experience. He could have

¹⁰⁰ (2000) 21 *ILJ* 2409 (LC)

¹⁰¹ (2005) 26 *ILJ* 150 (CCMA)

recorded telephone calls or did something to prove that he did no more than give the applicant an opportunity to commit the offense. The lack of evidence in this regard meant the applicant had to be given some leniency because the employer had not discharged its onus.

Due to the fact that the investigator's employer had requested R5000 for the video footage and another R5000 for the investigator to testify, it meant that the investigator's employer had an interest in the outcome of the matter. This further tarnished the respondent's version and credibility.

Prior to the existence of this matter, the respondent had not found any reason to suspect the applicant of any misconduct related to theft. The respondent therefore had no reason to require a trap for the applicant. All the facts mentioned above led to the investigator's evidence not being allowed to stand.

In *Sugreen v Standard Bank of SA*¹⁰², the applicant was dismissed for being implicated in bribery. The evidence implicating the applicant was a tape recording produced by a Mr Singh, the owner of one of the security companies providing security services to the bank. Mr Singh's company was responsible for protecting houses repossessed by the bank. However, it allowed people to occupy the houses while charging the bank for its services. This constituted a breach of contract between Mr Singh's company and the bank. The applicant was employed as the manager of the credit control department for the home loan division. She had the authority to terminate any contract with any of the bank's service providers if they were no longer providing sound security. Mr Singh and the applicant had several meetings regarding how the contract between the company and the bank can be maintained. It was established that the meetings were mainly concerned with monetary payment to the applicant in order for her to not terminate the contract. The applicant was allegedly paid but could not meet her end of the agreement. Mr Singh ultimately recorded a conversation between the applicant and himself on his home phone. The contents of that recording formed the basis of the applicant's dismissal as it pointed to her engagement in misconduct.

¹⁰² (2002) 23 ILJ 1319 (CCMA)

Although the respondent had not been willing to be involved in entrapping its employees, it relied on the evidence procured through entrapment. The evidence was also admissible in the arbitration proceedings because the commissioner found that the use of an employer's email and telephone are of interest to the employer where the employee is suspected of misconduct. In admitting the tape recorded evidence, among other factors, the commissioner took into account that the recording was not intended at entrapping the applicant into the commission of a crime; the recording was not conducted by the employer and; it was made during business hours using the employer's telephone. It thus seemed fair to admit the evidence. It should be noted that the admission of evidence does not automatically render it credible.

On evaluating the evidence, the commissioner found the applicant guilty of the charges against her. The tape recording was found to be legitimate, against the applicant's objection to its admissibility and credibility. The commissioner found it improbable that Mr Singh could have concocted the tape recording as argued by the applicant.

In light of the fact that Sugreen had not been suspected of any misconduct related to the reason for her dismissal, the nature of her misconduct justified dismissal because it severely prejudiced her employer against fairness with respect to a reciprocal employment relationship where the employee is expected to perform its duties and the employer fulfils its duties by remunerating the employee. It was thus a sound decision to admit the evidence, in the circumstances. As Stelzner AJ stated in the *Cape Town City Council*¹⁰³ case:

*"I would be reluctant if not unlikely to hold that a system of trapping (obviously properly constrained) may never be fair in the employment context".*¹⁰⁴

Stelzner AJ was making the point that the pursuit of justice through law enforcement would not be realized if evidence procured by entrapment would be excluded, in a situation where entrapment is properly constrained.

¹⁰³ *Cape Town City Council v SAMWU* (note 93 above)

¹⁰⁴ Ibid at para 60

8.4 Conclusion

It is evident, from the discussion of the cases above, that evidence obtained from entrapment is a legitimate form of admissible evidence in labour proceedings and a legitimate way of investigating misconduct in the workplace. Entrapment may be undertaken by an employer if it suspects the employee of misconduct and in order to protect its business from harm. However, an employer must have a legitimate reason and comply with the general rules for entrapment as set out in the CPA.

Chapter 9: Interception and Monitoring of Employees' Telecommunications

9.1 Introduction

Employees usually use their employer's telecommunication systems and services. Employers are constantly faced with telecommunications-related problems emanating from internet and/or telephone usage by employees. The problems arise when employees lose focus on their work and spend time surfing the internet or using phones to make personal transactions. If this occurs, the employer is essentially losing on productivity and ultimately loses revenue. Problems also arise where the employees engage in misconduct through the system. It is thus of interest to the employer to monitor the employees communications made by the employer's equipment. The telecommunications of employees can also be a source of valuable evidence when investigating or looking for evidence against an employee for misconduct.

On the other hand, employees expect their privacy to be intact at all times. This expectation may result from the Constitutional right to privacy.¹⁰⁵ However, this right is not an absolute right. It may be limited for justifiable reasons. The employer has a right to protect its business. The Regulation of Interception of Communications and Provisions of Communication-related Information Act¹⁰⁶ (RICA) was enacted, *inter alia*, to balance such rights in the workplace.

9.2 The Regulation of Interception of Communications and Provisions of Communication-related Information Act (RICA)

Indirect communication' is defined in RICA as:¹⁰⁷

- “...the transfer of information, including a message or any part of a message
whether-*
- (a) in the form of-*
- (i) speech, music or other sounds;*

¹⁰⁵ Section 14(6) of the Constitution of the Republic of South Africa 1996

¹⁰⁶ Act 70 of 2002

¹⁰⁷ Section 1 of RICA

- (ii) *data;*
- (iii) *text;*
- (iv) *visual images, whether animated or not;*
- (v) *signals; or*
- (vi) *radio frequency spectrum or;*

(b) *in any other form or in any combination of forms that is transmitted in whole or in part by means of a postal service or a telecommunication system”.*

From the definition above, indirect communication may include telephone calls, intranet, internet, private e-mail messages, SMS messages and voice-mail messages.

‘Intercept’ is defined in RICA as:¹⁰⁸

“...the aural or other acquisition of the contents of any communication through the use of any means, including an interception device, so as to make some or all of the contents of a communication available to a person other than the sender or recipient or intended recipient of that communication, and includes the-

- (a) monitoring of any such communication by means of a monitoring device;*
- (b) viewing, examination or inspection of the contents of any indirect communication and;*
- (c) diversion of any indirect communication from its intended destination to any other destination”.*

RICA prohibits the intentional interception of direct or indirect communication, with exceptions. One of the exceptions is that the prohibition only applies to an interception by a third party, and not to an interception by one of the two parties who are communicating. Therefore, if one of the

¹⁰⁸ Ibid

two parties intercepts and reveals the contents of that communication to a third party, such an act is not prohibited.

9.3 Interception without Employees Consent

Section 6 of RICA provides for instances where an employer may intercept employees communications without consent from the employees. However the evidence obtained from such interception and monitoring will only be admissible if certain requirements are met. These requirements are that:

- (i) The communications must have been made via the electronic and telecommunications systems provided for use wholly or partly in connection with the employer's business.
- (ii) The employees must have been notified in advance that indirect communications made via the employer's electronic and telecommunication system may be intercepted.
- (iii) The employer may not intercept communications at random and without a proper reason.
- (iv) The consent of the systems controller must be obtained in each case. The systems controller is defined as a 'natural person' in the case of a private body or any partner in a partnership and the chief executive officer (or person duly authorised by him or her) in the case of a juristic person.
- (v) The purpose of the interception must be to 'establish the existence of facts' relevant to the business and/or to 'secure' the system.¹⁰⁹

The employer must, therefore, have a reason for intercepting the employees' communications. It cannot intercept simply because it feels like doing so. Thus, for example, if an employee is charged with absenteeism, there is no reason to intercept his or her emails because evidence from the employee's attendance record and eyewitness testimony can establish the existence of facts.¹¹⁰

¹⁰⁹ Bellengere *et al* (note 43 above) 431

¹¹⁰ Ibid 432

It is a requirement that the employees were notified in advance of the employer's right under section 6 to intercept and monitor its employees' communications where the employee uses the employer's electronic and telecommunications system. In many instances, employers do this by drafting policies in this regard.¹¹¹ An employer can argue that consent to intercept an employee's communications was obtained when the employee signed the employment contract. In this sense, interception of communications forms part of an employment contract. Therefore, an employer can intercept the communication of his employees if he has proof that there was consent from the employees.

The interception must be conducted for the purposes of monitoring or keeping a record of indirect communications in order to establish the existence of certain facts that are relevant to the employer's business; to investigate or uncover unauthorised use of the telecommunications system and; to secure the effective operation of the system where this is done as an "inherent part of" the effective operation of the system.

In essence, Section 6 of RICA creates a balance between the right of an employee to privacy and the right of the employer to protect its business.

It must be noted that in order to contravene section 2 of RICA, the interception must be intentional. Discovering private electronic communication by accident would not be contravening section 2 of RICA. In *Smuts v Backup Storage Facilities*¹¹² the applicant was dismissed for viewing pornography using the respondent's computer. One of the applicant's subordinates had made a complaint to the respondent about the pornography as he occasionally came across it while working on the applicant's computer. Prior to the complaint about pornography, the respondent had not been monitoring the applicant's use of the computer. However, it became of interest to intercept the applicant's electronic communications because he was misappropriating company property and funds. The applicant had also been using the company vehicle for his own purposes. He also could not account for monies deposited into his bank account for work-related purposes. The respondent presented electronic evidence of the amount of time spent on the internet mainly

¹¹¹ An employer may argue that the notification formed part of the employment contract

¹¹² (2003) 3 BALR 219 (CCMA)

used by the applicant. This evidence was corroborated by two witnesses. The applicant testified that he used the internet purely for work-related purposes. However, he could not furnish evidence to corroborate his testimony. Ultimately, the applicant was dismissed, especially because he was a senior employee with a duty to protect company facilities, yet he was misappropriating the facilities.

In *Smith v Partners in Sexual Health (non-profit)*¹¹³, the information obtained from intercepting an employee's e-mails was not admissible because the employer was acting in contravention of the RICA as he had invaded the employee's privacy because the e-mail account used by the employee was not internal to the organisation and the nature of sending e-mails through the employee's account was not subjected to public viewing.

In *Moonsamy v The Mailhouse*¹¹⁴ the arbitrator stated that telephone conversations are a 'very private affair'. The employer must show that there are compelling reasons within the context of business that necessitate the contents of those conversations to be disclosed. He drew the line at continual tapping of an employee's business telephone and found that the employer could have and had, in fact, acquired evidence against Moonsamy by less intrusive means.¹¹⁵

In *Sugreen v Standard Bank of SA*¹¹⁶ the employer had obtained a tape recording of a conversation between one of its managers and a service provider, which revealed a bribe. The service provider made the tape recording and gave it to the employer. The arbitrator differentiated this case from *Moonsamy v The Mailhouse* on the basis that there were few other methods by which the evidence could have been acquired, that the recording was made during business hours and using the employer's telephone. In any event, it was a case of 'participant monitoring', which is permitted by RICA.¹¹⁷

¹¹³ *Smith v Partners in Sexual Health (non-profit)* (2011) 32 ILJ 1470 (CCMA)

¹¹⁴ *Moonsamy v The Mailhouse* (1999) 20 ILJ 464 (CCMA)

¹¹⁵ *Bellengere et al* (note 43 above) 432

¹¹⁶ *Sugreen v Standard Bank of SA* (2002) 23 ILJ 1319 (CCMA)

¹¹⁷ *Bellengere et al* (note 43 above) 432

The Court in *Protea Technology Ltd and Another v Wainer and Others*¹¹⁸ pointed out that an employee may receive and make calls that have nothing to do with his or her employer's business. The employee making such calls has a legitimate expectation of privacy and the employer cannot compel him or her to disclose the substance of such calls. However, the employer may have access to the content of conversations involving the employer's affairs.¹¹⁹

In *Bamford and Others v Energiser (SA) Limited*¹²⁰, the arbitrator sanctioned the collection and storage of email messages from employees' private mailboxes on the basis that the content of the messages (crude jokes and pornographic material) could not be construed as private. Moreover, when the company conducted an audit of its system when technical problems arose through overloading, it was seeking to establish the existence of facts indicating the root of the technical problem. It needed to secure the system's effective operation and, in the process, discovered improper use of the system, which amounted to misconduct.¹²¹

9.4 Conclusion

This chapter has discussed some of the RICA provisions that are relevant to the employment context. It has also mentioned how employers should go about when dealing with information obtained from their employees communications without contravening their employees' privacy, but still maintaining their business interests. In light of the RICA provisions discussed above, and based on an employee's constitutional right to fair labour practices, it is suggested that an arbitrator does indeed have the discretion to exclude illegally and improperly obtained evidence.¹²²

In this context, fairness may be defined in terms of balancing the employee's right to dignity and privacy, the employer's right to protect its business and the rule that an employer's decision should be substantively and procedurally fair where the rights of employees are concerned. Based on this

¹¹⁸ (1997) 9 BCLR 1225 (IC)

¹¹⁹ Bellengere *et al* (note 43 above) 432

¹²⁰ (2001) 12 BALR 1251 (P)

¹²¹ Bellengere *et al* (note 43 above) 432

¹²² Ibid

and the fact that section 6 of the LRA already accommodates the balancing of rights and prejudice, the arbitrator should consider the following factors in determining whether to admit the evidence:

- 1) whether the evidence could have been obtained lawfully
- 2) whether the employer knowingly and deliberately contravened any law that regulates the gathering of the evidence, such as RICA
- 3) whether there was a pre-existing suspicion that the employee was committing misconduct
- 4) whether there were reasonable grounds for believing that evidence relating to that offence may be found in the communications of the employee.¹²³

¹²³ Bellengere *et al* (note 43 above) 431

Chapter 10: The Electronic Communications and Transactions Act

10.1 Introduction

This chapter will briefly discuss the Electronic Communications and Transactions Act¹²⁴ with regard to how it assists with the admissibility of electronic evidence. Electronic evidence might present as a problem because it can be easily manipulated or altered. Traditional paper documents, on the other hand, are more readily acceptable in courts unless there is a dispute concerning their authenticity. Electronic evidence is not easily acceptable and this requires it to be treated with caution.

10.2 Status of the evidence

The Electronic Communications and Transactions Act¹²⁵ gives computer-generated documents the same legal status as ordinary paper evidence. In *S v Harper*¹²⁶ the court held that computer printouts are regarded as documents. Therefore, in order for the printouts to be admissible, they have to satisfy the admissibility requirements for documentary evidence. The rules that have to be complied with before a document can be admissible are: (1) the document must contain statements that are relevant and admissible; (2) the document must be proved to be authentic; (3) the original document must be produced.

10.3 Originality

“No evidence is ordinarily admissible to prove the contents of a document except the original document itself”.¹²⁷ However, section 15(1) (b) of the Electronic Communications and Transactions Act¹²⁸ (ECTA) renders data messages exempt from this rule. This section allows data

¹²⁴ Act 25 of 2002

¹²⁵ Act 25 of 2002

¹²⁶ 1981 (1) SA 88 D

¹²⁷ Zeffertt *et al* (note 39 above) 686

¹²⁸ Act 25 of 2002

messages to be admissible even though they are not in their original form. It merely has to be the best evidence available.

Section 17 of the ECTA allows for the production of a document in the form of a data message. It simply requires that the document be trustworthy. A computer printout is a duplicate of the original and thus admissible once it has been certified as authentic.¹²⁹ Although a computer printout is accepted as electronic evidence, it does not constitute an original. The original message remains in an electronic form in the computer.

10.4 Authenticity

Authenticity refers to the evidence being what it purports to be.¹³⁰ In *Moloko v Ntsoane and Others*¹³¹ the respondent had dismissed the applicant for allegedly bumping into a customer. The respondent alleged to have recorded the incident on video tape. However, the video tape was blurry and the Judge could not determine that the video footage was actually what it purported to be. The respondent failed to show that the video had not been tampered with. Tokota AJ found the video tape evidence (electronic evidence) to be inadmissible and ordered the reinstatement of the applicant.

It should be noted that to satisfy the requirements for authenticity, the contents of the evidence must be shown to have remained unchanged; the information constituting the evidence must be shown to originate from its purported source and; extraneous information, for instance, the apparent date of the evidence must be shown to be accurate.¹³²

¹²⁹ S v De Villiers 1993 (1) SACR 574 (Nm)

¹³⁰ Zeffertt *et al* (note 39 above) 694

¹³¹ 2004 (JR 1568/02) ZALC 35

¹³² Galves F & Galves C 'Ensuring the Admissibility of Electronic Forensic Evidence and Enhancing its Probative Value at Trial' (2004) 19(1) *Criminal Justice Magazine* 3

10.5 Conclusion

Electronic evidence may seem problematic due to its ease of manipulation. However, legislation such as the ECTA has been enacted to facilitate its admissibility in the sense that it allows for data messages to be admissible even though they are not in their original form. In admitting electronic evidence, arbitrators must ensure that the evidence is relevant to the matter in the proceedings. The evidence must also be authenticated if a dispute arises regarding its authenticity. Originality of electronic evidence is not strictly required as one of the admissibility requirements. The evidence can be admitted if it is shown that it is a duplicate of the original which remains in the computer system.

Chapter 11: Reviews

11.1 Introduction

Each party has a right to review an arbitration award if it found the commissioner to have committed an error whether in the arbitration proceedings or in the result thereof. In certain instances, commissioners will exceed their powers and reject evidence when they should have admitted it. However, a commissioner's award can be set aside by the Labour Court if it is legally justifiable to do so. This section will discuss reviews based on arbitration awards or an error committed in the arbitration proceedings.

Section 145(1) of the Labour Relations Act¹³³ states that:

“Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award”.

11.2 The review test

The test as to when the Labour Court will interfere with a CCMA award, often referred to as the Sidumo test,¹³⁴ has been recently restated by the SCA in *Herholdt v Nedbank Ltd and Another*¹³⁵ in the following terms:

“In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2) (a) (ii), the arbitrator must have misconceived the

¹³³ Act 66 of 1995

¹³⁴ *Sidumo v Rustenburg Platinum Mines Ltd* (note 10 above)

¹³⁵ *Herholdt v Nedbank Ltd* (note 10 above) at para 25

nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors are fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.”

The court in *Solidarity obo Van Zyl v KPMG Services (Pty) Ltd and Others*¹³⁶ held:

“While arbitrators should always aspire to meet the exacting standard set by the SCA in Stellenbosch Farmers’ Winery for proper assessment of conflicting versions, an arbitration award that does not live up to this standard will not automatically be subject to review. Arbitrators are empowered to deal with the dispute with minimum of legal formalities, the decisions are immune from appeal, and the legislature has set a high bar for reviewing arbitration awards. Errors committed by an arbitrator in the assessment thereof will not necessarily vitiate an award.”

With this test in mind the court then assessed the review application and found that by failing to assess the credibility of any of the witnesses, the arbitrator fell short of the standard aspired to in *Stellenbosch Farmers’ Winery*. However, this alone did not render the award reviewable without first considering whether the decision fell within the band of reasonableness.

In the matter between *Gaga v Anglo Platinum Limited (Pty) Ltd and others*¹³⁷ the applicant was dismissed by the respondent for sexually harassing his personal assistant. He was reinstated at a CCMA arbitration after the commissioner found the applicant not guilty of misconduct. The respondent company successfully reviewed the arbitration award. The matter was taken to the Labour Appeal Court (LAC) by the applicant with no success. The LAC held that the commissioner had failed to have regard to relevant considerations and failed to apply his mind

¹³⁶ Unreported case no JR960-12 (Fourie AJ) at para 17

¹³⁷ *Gaga v Anglo Platinum Limited (Pty) Ltd and others* (2012) 33 ILJ 329 (LAC)

properly to material evidence. The court made the following remark with regard to the commissioner's conduct:

*“Where a commissioner fails properly to apply his mind to material facts and unduly narrows the inquiry by incorrectly construing the scope of an applicable rule, he will not fully and fairly determine the case before him. The ensuing decision inevitably will be tainted by dialectical unreasonableness (process-related unreasonableness), characteristically resulting in a lack of a rational connection between the decision and the evidence and most likely an unreasonable outcome (substantive unreasonableness). There will often be an overlap between the ground of review based on a failure to take into consideration a relevant factor and one based on the unreasonableness of a decision. If a commissioner does not take into account a factor that he is bound to take into account, his or her decision invariably will be unreasonable. The flaw in process alone will usually be sufficient to set aside the award on the grounds of it being a latent gross irregularity, permitting a review in terms of section 145(1) read with section 145(2) (a) (ii) of the LRA”.*¹³⁸

11.3 Conclusion

Arbitrators must apply their minds when assessing evidence in respect of admissibility and weight and must evaluate the evidence of the witnesses when resolving disputes of fact. However, where the arbitrator fails to do this properly, this alone does not render the award reviewable without first considering whether the decision fell within the band of reasonableness.

Arbitration awards must show that the commissioner did in fact regard all the material before him. This is due to the fact that, even though the outcome of the proceedings might be correct, it can be reviewed based on the process used by the commissioner which might have caused one of the parties' unfairness.

¹³⁸ *Gaga v Anglo Platinum Limited* (note 137 above) at para 44

Chapter 12: Conclusion

This dissertation discussed the admissibility of certain types of evidence namely, hearsay evidence, evidence obtained from entrapment and evidence obtained from the interception and monitoring of employees' telecommunications. This dissertation started out by discussing what evidence is, the types of evidence and what it is used for. As mentioned above, the most common type of evidence that is used in arbitration proceedings is documentary evidence. This is due to the fact that even though oral evidence is the starting point of adducing any evidence, it still requires other evidence to corroborate the oral evidence. Thus, oral evidence is not always enough to resolve a labour dispute. In light of the vast electronic systems used in most workplaces, documentary evidence becomes paramount in the resolution of a labour dispute because it forms a major part of the material used in the ordinary course of business.

This dissertation went on to discussed how arbitrators should conduct arbitration proceedings with regard to the powers they are given by statute. Section 138¹³⁹ gives arbitrators the power to conduct arbitration proceedings in a manner they deem fit. Arbitrators should keep in mind that they need to resolve a dispute as soon as is practically possible. This should be done with minimal legal procedures or formalities. Thus, arbitrators should also keep in mind that arbitration proceedings are not civil proceedings. This, however, does not mean they should disregard the application of the law. Thus, when arbitrators admit evidence, the requirements of the admissibility of that evidence should be met. The evidence should thus be relevant to the dispute and must have some indication of reliability. The evaluation and weight given to any admitted evidence should also be within the confines of the law. The onus of proof should be discharged by the relevant party to the dispute, before an arbitrator reaches a decision about the dispute. Arbitrators should deal with the substance of the matter at hand but still maintain an environment conducive to resolving the dispute, in terms of not making it feel like that of a formal court, especially because the parties to the dispute may not be familiar with legal proceedings.

¹³⁹ Section 138 of the Labour Relations Act 66 of 1995

Hearsay evidence was discussed with regard to its admissibility in labour arbitration proceedings. Hearsay is generally inadmissible because of the prejudicial effect it has on the party it is to be used against. It is also problematic to the presiding officer because of the uncertainty it creates in terms of the truthfulness of its contents. However, evidence should be admitted if its admission tends to prove certain facts which will help resolve a dispute. Thus, hearsay should be admitted if it will help the arbitrator get to the truth about any disputed facts and thus reach a decision about the overall dispute. However informal arbitration proceedings are, arbitrators are not to relax their application of the law, thus they should adhere to section 3 of the Law of Evidence Amendment Act¹⁴⁰. In the absence of a legal justification for the admission or rejection of hearsay evidence, the arbitrator would have made an error which might lead to the reviewing of his/her decision regarding the evidence.¹⁴¹ Evidence may also be admitted in the interests of justice. In this regard, section 3 (1) (c) of the Law of Evidence Amendment Act should be considered. However, arbitrators are not required to excessively apply the provisions of this subsection as this would hinder the efficient resolution of disputes.¹⁴²

Entrapment is a legitimate form that employers may use to obtain evidence that will be admissible in labour arbitration proceedings. Arbitrators should establish whether the employer had any reason to suspect the trapped employee of any misconduct, prior to embarking on the entrapment. This is a requirement for evidence obtained from entrapment to be admissible as the employer cannot simply embark on trapping employees without a genuine reason. The CPA should be used as a guideline for entrapment in the labour law context. What is of paramount importance in entrapment is that the trap should not provide more than an opportunity to the targeted employee as that would fall out of the legal bounds of a legitimate entrapment exercise and thus render evidence obtained from such, inadmissible.

¹⁴⁰ Law of Evidence Amendment Act 45 of 1988

¹⁴¹ *Gaga v Anglo Platinum Limited* (note 137 above)

¹⁴² *Le Monde Luggage cc t/a Pakwells Petje v Dunn NO* (2007) 28 ILJ 2238 (LAC)

The interception of employees' telecommunications was discussed in light of an employer's right to fair labour practices in terms of protecting its business. Employees' rights to privacy were also considered in this chapter. Section 6 of RICA caters for or attempts to strike a balance between these two parties' rights by stating that an employer has to meet certain requirements before it can intercept its employees' communications. It was mentioned that the employer must have a reason for the interception, and such reason must be directly related to the employer's business. Thus, if the employer does not adhere to legislation such as RICA, or goes against the law in obtaining information against its employee(s), an arbitrator may reject such evidence. Chapter ten discussed the Electronic Communications and Transactions Act in the labour law context. This Act provides electronic documents with the same status as documentary evidence. In other words, computer printouts are regarded as documentary evidence, and are thus admissible given they meet the admissibility requirements for documentary evidence. Therefore an arbitrator may admit electronic evidence if it is a replica of the original which is kept in a computer system. If the authenticity of such evidence is put into question, then the evidence must be shown to be authentic, which would be quite easy to do given that the evidence was computer generated.

The case law referred to throughout this research revealed that there is consistency in the application of the law. The successful reviews that are undertaken by the review courts point to the fact that arbitrators are not fully applying their minds to the material that is produced before them. Such errors on the arbitrators' part are evident in the awards they issue. An arbitration award should reveal that there was proper consideration of all the relevant material produced at the arbitration proceedings. In cases where an arbitrator's decision was upheld by a reviewing court, also points to the fact that the applicability of the law or relevant legislation is not compromised by the nature of arbitration proceedings. Thus the merits of a case are looked into, in light of the environment not being as formal as that of a court of law.

In conclusion, this dissertation attempted to look into the admissibility of certain types of evidence in arbitration proceedings and the issues that arise in the course of these proceedings. It was concluded that the strict rules of evidence should be relaxed given the nature of arbitration proceedings and the requirement of section 138 to have a speedy resolution of labour disputes. It is thus recommended that arbitrators well-equip themselves with labour law in general, how to conduct arbitration proceedings and the admissibility requirements of specific types of evidence.

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